Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:BRK:TL-N-5329-99
TKerrigan

date:

to: Chief, Examination Division
Attention: Group 1108 - Income, Bruce Dickter
E:E:F:1108:BD

from: District Counsel
Brooklyn CC:NER:BRK

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subject: [redacted]

U.I.L. No. 0051-02-03

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This memorandum is in response to your facsimile request for advice, dated August 27, 1999, concerning the above-named taxpayer's claim for the targeted jobs credit.

FACTS

The relevant facts, as we understand them, are as follows: The taxpayer is a national fast food franchise that operates approximately [redacted] establishments. During [redacted], the taxpayer alleges that it employed numerous members of targeted groups as that term is defined in I.R.C. § 51(d)(1)(A)-(J) for purposes of the targeted jobs credit. The taxpayer further alleges that it applied for, but never received certification from the appropriate designated local agencies. On or about [redacted], the taxpayer filed a Form 1120X, Amended U.S. Corporation Income Tax Return claiming a targeted jobs credit in the amount of $[redacted] for these uncertified employees.

ISSUE

Whether the taxpayer is entitled to claim a targeted jobs credit without certification by the designated local agency that the individual employee was a member of a targeted group.

LEGAL ANALYSIS

I.R.C. § 51, prior to amendment by § 1201(d) of the Small Business Job Protection Act of 1996, P.L. 104-188, 8/20/96, allows employers to take a credit for wages paid to employees who are members of one of the targeted groups, provided the employer has either received or requested certification for that employee from the designated local agency before the employee begins work. I.R.C. § 51(d)(16). The credit applies to wages paid to individuals who began work before January 1, 1995. I.R.C. § 51(c)(4). The credit is 40% of the first $6,000 of qualified first-year wages. I.R.C. § 51(a).[1/] Treas. Reg. § 1.51-1(d)(6) requires that an employer receive certification before claiming the credit.[2/]

In the present case, the taxpayer relies on Perdue Farms, Inc. v. United States, 84 AFTR2d ¶ 99-5056, 99-2 USTC ¶ 50,659 (1999) where the United States District Court for the District of Maryland allowed the targeted jobs credit even though the employees for whom it claimed the credit were never certified as members of targeted groups. The court held that when it is undisputed that certification would have been granted, the government cannot deny a corporation the tax credit simply because the local agency failed to process its certification requests before the program expired. We note that the Service

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[1/] In addition, no wages paid to a targeted group member are taken into account unless the individual either (1) was employed for at least 90 days (14 days for economically disadvantaged summer youth employees), or (2) had completed at least 120 hours of work (20 hours for summer employees). I.R.C. § 51(i)(3).

[2/] Treas. Reg. § 1.51-1(d)(6) Certifications that are not timely. Any certification that is not timely received or requested by the employer in accordance with the rules of this paragraph will be treated as invalid. Thus, the employer will not be allowed to claim a credit under section 51 with respect to any wages paid or incurred to an employee whose certification or request for certification is not timely. A timely request for certification does not eliminate the need for the employer to receive a certification before claiming the credit. In the case of a request for certification that was denied, resubmitted, and then approved, the timeliness of the request shall be determined by the timeliness of the first request.

has not acquiesced in that decision and has recommended appeal in the case.

In contrast to Perdue Farms, the United States District Court for the Western District of Texas, entered a order granting the government's motion for partial summary judgment with respect to the disallowance of the targeted job tax credit where certification was not obtained. See H.E. Butt Grocery Company v. United States, Civil No. SA-98-CA-335-EP (W.D. Tex. July 30, 1999).

Tax credits, like deductions, are a matter of legislative grace, and taxpayers bear the burden of proving they are entitled to the credit. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). The statutory language of I.R.C. § 51 and the regulations promulgated thereunder require certification. Therefore, where as in this case, the taxpayer fails to meet the literal requirements of the Code, the credit should be denied. See Hokanson v. Commissioner, 730 F.2d 1245, 1250 (9th Cir. 1984) [relating to the disallowance of an investment tax credit]. Accordingly, the taxpayer is not entitled to claim a targeted jobs credit without certification by the designated local agency that the individual employee was a member of the targeted group.

The advice rendered herein is consistent with the Service's current position as outlined in a memorandum, dated June 24, 1999, from the Retail Industry Specialist for the Midstates Region instructing examiners to disallow the credit if the proper certification has not been obtained by the taxpayer. A copy of the memorandum with attachments is included for your information.

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routine procedures, which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

If you have any questions or require further assistance, please contact Thomas Kerrigan at (516) 688-1742.

DONALD SCHWARTZ
District Counsel

By: _____
JODY TANCER
Assistant District Counsel

Attachment:
As stated